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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 625

GEORGIA RAILWAY & ELECTRIC COMPANY, GEORGIA RAILWAY & POWER COMPANY AND GEORGIA POWER COMPANY,

Appellants,

vs.

CITY OF DECATUR.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JAMES A. BRANCH,
WM. SCHLEY HOWARD,
SCOTT CANDLER,
Counsel for Appellee.

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Appellants,

vs.

CITY OF DECATUR,

Appellee.

STATEMENT OF CITY OF DECATUR, APPELLEE, OPPOSING JURISDICTION, AND MOTION TO DISMISS OR AFFIRM.

To the Honorable the Chief Justice of the United States and the Associate Justices:

Now comes the City of Decatur, appellee in the above stated cause, and, in pursuance of Rule 12 (3) of this Court, files this its statement against the jurisdiction of this Court asserted by the appellants; and, acting under Rule 7 (3) and (4) of this Court, moves the Court to dismiss the appeal in said cause or affirm the decision of the lower court.

The statement opposing jurisdiction, and the motion to dismiss or affirm, are based upon the grounds:

a) That there is no substantial Federal question involved; and,

b) That the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

All of the Federal questions raised by the assignment of errors have been settled by numerous decisions of this Court, as will be pointed out in the following statement and brief.

Statement of the Case.

The case was before this Court and was decided on April 29th, 1935 (*Georgia Railway & Electric Company* v. *Decatur*, 295 U. S. 165). It was reversed and remanded to the lower court (The Supreme Court of Georgia) for further proceedings not inconsistent with the opinion of this Court. The Judgment of the state supreme court was reversed for the sole reason that this Court construed the opinion of the state court as having held that the state statute which authorized, and the ordinance which directed, assessments against street railway companies for the cost of paving portions of streets occupied by the tracks of such companies required, as the basis for their operation, the existence of benefits, and that under this construction of the statute and ordinance the refusal of the state court to receive evidence of lack of benefits to such street railway companies amounted to a denial of due process of law. When the case was remanded to the Supreme Court of Georgia for further proceedings, not inconsistent with the opinion of this Court, the City of Decatur (the appellee) made a motion in that court (which motion was duly served upon the appellants)

for that court to further consider and to pass upon the questions which had been raised and argued before that court and which had not then been passed upon by it, including the question whether the state law, and the ordinance, under which the assessment in question had been made were sustainable under the police power of the state and under the reserved power to alter or amend corporate charters, irrespective of special benefits to the street railway companies occupying with their tracks portions of the street improved. The appellants filed a response to this motion and the state supreme court, after considering the motion, and the response, rendered an opinion and judgment holding that the state law, and the ordinance passed in pursuance thereof, under which the assessment in question was made was a valid exercise of the power expressly reserved in the state to alter and amend corporate charters and of the police power of the state; and that under a statute of Georgia (Code of 1933, section 94-1002) which, in effect, became a part of the franchise under which the appellants constructed and operated their lines in the City of Decatur, the appellants were liable for the assessment in question, irrespective of any special benefits to them, or their property, from the street improvement for which the assessment was made. The Supreme Court of Georgia further held that the appellants are precluded and estopped from attacking the assessment in question, because they did not act promptly and in accordance with well established methods of procedure under Georgia law.

Argument and Citation of Authorities in Support of Motion.

The judgment of the Supreme Court of Georgia, from which the appeal is taken, is not inconsistent with the opinion rendered by this Court on April 29th, 1935. In that opinion, this Court held that the judgment of the Su-

preme Court of Georgia affirming the judgment of the Superior Court of Fulton County was erroneous for the reason, and solely for the reason, that the Supreme Court of Georgia had held that there was no error in the ruling of the trial court in excluding, as immaterial, evidence to the effect that the street improvement in question, for which the assessment against the appellants was made, did not benefit the property of the appellants. This ruling of this Court was based solely upon the fact that this Court construed the decision of the Supreme Court of Georgia as holding that the statutes under which the assessment was made (Georgia laws, 1919, page 934 *et seq.*; Georgia laws, 1924, page 534 *et seq.*) require, as a basis of their operation, the existence of benefits. The decision of this Court reversed the judgment of the Supreme Court of Georgia and remanded the case "for further proceedings not inconsistent with" the opinion.

The effect of the reversal was to leave the state court free to take further action and proceedings in the cause, provided such further proceedings were not inconsistent with the opinion of this Court. The court below was not given any directions as to what further proceedings should be taken. This Court did not itself construe the state statutes, but expressly recognized that this was for the supreme court of the state to do.

> "A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided."
>
> *Mutual Life Insurance Company* v. *Hill*, 193 U. S. 551, 553;
>
> *Wolff Packing Company* v. *Court of Industrial Relations* (Kans.), 267 U. S. 552, 562;
>
> *General Investment Company* v. *Lake Shore & Michigan Southern Railway Company*, 260 U. S. 261, 284;
>
> *Hartford Life Insurance Company* v. *Blincoe*, 255 U. S. 129, 134.

The opinion of this Court, rendered April 29th, 1935, (*Georgia Railway & Electric Company* v. *Decatur*, 295 U. S. 165) did not preclude the Supreme Court of Georgia from further construing the state statutes under which the assessment was made.

> "The mandate while reversing the judgment that was under review on the former writ of error, permitted further proceedings of any kind to be had in the state courts, provided they were not inconsistent with the opinion of this Court. It left the tribunals of the state at liberty to exercise their proper jurisdiction in the cause between the parties."
>
> *Schneider Granite Company* v. *Gast Realty & Investment Company*, 245 U. S. 288, 290;

To the same effect, see:

Ward v. *Board of County Commissioners of Love County (Okla.)*, 253 U. S. 17, 25;

Clark v. *Williard*, 294 U. S. 211.

This Court did not construe, or undertake to construe, the Georgia statutes, but construed the opinion and decision of the Supreme Court of Georgia.

The mandate of the Supreme Court of the United States did not require that the cause be remanded to the trial court. The further proceedings to be taken in the cause were left to the State courts.

Schneider Granite Company v. *Gast Realty & Investment Company*, 245 U. S. 288, 291.

The further proceedings in the Supreme Court of Georgia, after the case was remanded, were had after due notice was given to the appellants. Said proceedings were had upon a motion, duly filed by the City of Decatur and served upon the appellants (Record, page —). "The Power Company resisted this motion" before the Supreme

Court of Georgia (See opinion of the Supreme Court of Georgia, Record, page —).

Under the State statutes authorizing the assessment against the appellants (Georgia laws, 1919, page 934 *et seq.;* Georgia laws, 1924, pages 534 *et seq.*), as now construed by the Supreme Court of Georgia, the question of benefits, or lack of benefits, to the property of the appellants is immaterial.

Fort Smith Light & Traction Company v. *Board of Improvements of Paving District No. 16 of Fort Smith,* 274 U. S. 387;

Fair Haven & Westville Railroad Company v. *City of New Haven,* 203 U. S. 379;

Sioux City Street Railway Company v. *Sioux City,* 138 U. S. 98;

Durham Public Service Company v. *City of Durham,* 261 U. S. 149.

In the opinion, delivered in this case on April 29th, 1935, this Court, in effect, recognized the above stated principle. From the opinion we quote the following:

> "In this court, the city insists that, under Georgia law, 'The general rule that assessments against abutting owners for street improvements are sustainable only to the extent of special benefits to abutting property is not applicable to railway companies having tracks in the street improved'. And it seeks to sustain the assessment as an exercise of the police power and the alleged power of the state to alter or amend corporate charters. If the Georgia statutes had been thus construed by the state supreme court, a different question would be presented."

A statute of Georgia, which was of force when the appellants constructed their street car lines in the City of

Decatur (Code of Georgia of 1933, section 94-1002) provides that:

> "No street railroad or interurban railroad incorporated under this Chapter shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: and Provided further, that all railroad companies incorporated under this Chapter shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them with reference to the railroad or the portion thereof located within the limits of said municipal corporation."

The Supreme Court of Georgia, in its opinion in the case at bar, cites this statute and holds:

> "When the Georgia Power Company accepted its charter and with the consent of the city entered on its streets with its railway-tracks, it did so subject to the general law of the State and to the power of the State to amend the city charter by further legislation dealing with the upkeep of the streets. Under its laws the State reserves the power and authority to withdraw, alter, or amend private charters. Under the laws of this State this legislation was authorized. The Code of 1933, section 79-101, provides: 'Persons are either natural or artificial. The latter are creatures of the law, and, except so far as the law forbids it, subject to be changed, modified, or destroyed at the will of their creator; they are called corporations.' 'In all cases of private charters granted since January 1, 1863, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter.' Section 22-1202.
>
> "So when the Georgia Power Company was organized and with the consent of the city entered on the streets with its railway-tracks, it did so subject to the general law of the State and the power of the State to amend the city's charter by further legislation with

respect to the upkeep of the streets. *Atlantic & Gulf R. Co.* v. *State*, 98 U. S. 359; *West End & Atlanta Street R. Co.* v. *Atlanta Street R. Co.*, 49 Ga. 151; *Fort Smith Light, &c., Co.* v. *Board of Improvement*, 274 U. S. 387; *Fair Haven, &c., R. Co.* v. *New Haven*, 203 U. S. 379; *Sioux City Street R. Co.* v. *Sioux City*, 138 U. S. 98; *Union Branch R. Co.* v. *E. T. & G. R. Co.*, 14 Ga. 327."

This Court accepts the State court's construction of statutes of the State.

Clark v. *Williard*, 292 U. S. 112, and same case, 294 U. S. 211.

St. Louis & Kansas City Land Company v. *Kansas City*, 241 U. S. 419, 427, where this Court said:

> "The extent of the authority conferred upon the city by its charter, the construction of the various provisions of the charter, the validity, scope, and effect under the state law of the ordinances adopted by the city, and the scope and effect of the original and supplemental proceedings, and the rights of the parties thereto, under the state law, are state questions, as to which the decision of the state court is controlling."

Also, to the same effect, see:

Farncomb v. *City of Denver*, 252 U. S. 7, 10;
Baccus v. *Louisiana*, 232 U. S. 334, 337;
Mackay Telegraph Company v. *City of Little Rock*, 250 U. S. 94.

The Supreme Court of Georgia in the decision, which is now sought to be reviewed, held that the appellants are estopped from now attacking the validity of the assessment because they had knowledge of the fact that the improvement was to be made, and that they would be called upon to pay their proportionate part of the cost for such im-

provement, but took no affirmative action to question the necessity or propriety of the improvements being made and, according to well settled principles of procedure under Georgia law, they are estopped by reason of their laches. A number of decisions of the Supreme Court of Georgia establishing this principle are cited in the opinion.

This Court accepts the decision of the highest court of the State as to matters of State practice and procedure.

St. Louis & Kansas City Land Company v. *Kansas City*, 241 U. S. 419, 427;

Central Vermont Railroad Company v. *White*, 238 U. S. 507, 513;

Hartford Life Insurance Company v. *Blincoe*, 255 U. S. 129;

General Investment Company v. *Lake Shore & Michigan Railway*, 260 U. S. 261, 284.

WHEREFORE, City of Decatur respectfully prays that this Court determine that there is no substantial Federal question involved in this appeal, and that the questions raised by the appeal are so unsubstantial as not to need further argument, and that the appeal be dismissed or the judgment of the lower court affirmed.

December 4, 1935.

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